CHOON SHIN CHEONG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, JOHOR BAHRU
DATO' MOHD. GHAZALI BIN MOHD. YUSOFF JC
[CRIMINAL APPEAL NO. 41 - 58 - 93]
1 OCTOBER 1994

***REVENUE LAW**: Offences under s. 78(a) read together with s. 120 of Income Tax Act, 1967 - Failure to complete and submit Form of Return of Income for years 1981, 1986 and 1987 to Director General of Inland Revenue within 30 days - Defendant was appointed official liquidator of tax-payer company by High Court - Winding-up petition against company - Liquidator returned forms to Inland Revenue Dept. without completing it but with explanation for non-completion - Whether the explanation tantamounts to "reasonable excuse" as stated in s. 120 of the Act for not completing the assessment forms.*

The defendant, a public accountant by profesion was on 16 April 1987 appointed provisional liquidator of Maharani Ekonomi Supermarket Sdn. Bhd. by the High Court, Johor Bahru as a result of a winding-up petition. On 15 August 1988, the defendant was subsequently appointed as official liquidator. On 10 September 1992 the defendant was charged with 3 offences under s. 78(a) read with s. 120 of the Income Tax Act 1967, namely, for failing to complete and submit to the Director General of Inland Revenue, within 30 days, the Form of Return of Income of the said supermarket for the years 1981, 1986 and 1987. The defendant claimed trial and was subsequently found guilty on all three charges. He was fined RM150 for each offence.

Held:

[1] The facts in this case and the explanation given by the defendant to the Inland Revenue Department constitute what tantamounts to "reasonable excuse" as stated in s. 120 of the Income Tax Act 1967.

[2] The evidence of DW2 who was an officer of the department's branch in Johor Bahru with whom the defendant had met to discuss his predicement also corroborated his testimony to show that he had a valid and reasonable excuse for not completing the assessment forms for those years.

[Appeal allowed]

Legislation referred to:
Income Tax Act 1967, ss. 120, 78(a)
Companies Act 1965, ss. 233, 234 , 236(2)

For the appellant - P. Navamani; M/s. T.S. Chong & Co.
For the respondent - Ishak Bakri, SFC

JUDGMENT

Mohd. Ghazali Bin Mohd. Yusoff JC:

The defendant was charged on 10 September 1992 with 3 offences under s. 78(a) of the Income Tax Act 1967, read together with s. 120 of the same Act, namely, for failing to complete and submit to the Director General of Inland Revenue, within 30 days, the Form of Return of Income of Maharani Ekonomi Supermarket Sdn. Bhd. for the years 1981, 1986 and 1987.

He claimed to be tried and was subsequently found guilty on all three charges and was fined RM150 for each offence. Being dissatisfied with the finding of guilt, he has appealed.

The facts of this case are straightforward:

The defendant, a public accountant by profession, was appointed provisional liquidator of Maharani Ekonomi Supermarket Sdn. Bhd. by the High Court, Johor Bahru, as a result of a winding-up petition, on 16 April 1987 and was subsequently appointed as official liquidator on 15 August 1988. On 6 June 1988 the Kelantan branch of the Inland Revenue Department sent 3 notices under s. 78(a) of the Income Tax Act and attached 3 Forms of Return of Income in respect of the said company for the years of assessment 1981, 1986 and 1987 which have to be completed accordingly and submitted within 30 days from the date of service of the notice.

He received the notices together with the forms on 9 June 1988 and on the same day returned the forms to the said department, without completing them, with a covering letter explaining that he was appointed provisional liquidator on 16 April 1987 and as such the completion of the tax assessment forms for the said years do not arise. He also enclosed two copies of his earlier letters addressed to the Kelantan branch of the said department, dated 1 September 1987 and 3 September 1987, respectively, wherein he had enclosed copies of the Court order appointing him as provisional liquidator and at the same time requesting the department to confirm whether the said company had any tax liabilities up to 15 April 1987. He received a reply dated 25 September 1987 from the said department informing him as follows:

> Sila maklum akaun syarikat di atas menunjukkan baki tiada selepas Cukai 1982 dikurangkan bertarikh 2 April 1983.

However on 10 September 1992 he was charged in the Magistrate's Court at Johor Bahru with the three said offences. At the close of the prosecution's case he was called upon to enter his defence. In his defence, he stated that he had returned the three assessment forms without completing them as he did not have the records of the said company on that date for the years 1981, 1986 and 1987. As such he could not comply with the requirement and if he had done so it would have tantamount to filing false returns. He stated that he had even approached the department's branch in Johor Bahru to explain his predicament. He also produced several copies of letters which he had written to the directors of the said company requesting them to furnish him as liquidator a statement as to the affairs of the company as at the date of the winding up order as required under s. 234 of the Companies Act 1965 and a copy of which had to be filed in Court but received no response from them. He also produced evidence to show that all his letters addressed to the directors of the company were returned by the postal department.

The learned Magistrate found him guilty for the following reasons:

(i) the defendant had returned the assessment forms immediately upon receipt without completing them and without giving any explanation whereas he had 30 days to comply with the said s. 78;

(ii) after receipt of the said notice the defendant did not contact the Registrar of Businesses, the Employment Provident Fund and the Internal Revenue Department within the 30 days period;

(iii) the defendant had mistakenly assumed that returning the forms was sufficient for the purposes of s. 78(a) of the Act; and

(iv) pursuant to the said s. 78, it is clear that the defendant must complete the forms and submit them within 30 days and that if the defendant had attempted to contact the Inland Revenue Department within the 30 days, the Court would have ruled that he had acted with "reasonable excuse.

As such he found the defendant guilty on all three charges.

With due respect to the learned Magistrate I am of the view that he was not very well versed with the facts and neither was he sure of the functions and duties of a liquidator, and neither has he explained as to the necessity for the defendant to contact the Registrar of Businesses (I should think he was referring to the Registrar of Companies) and the Employees Provident Fund office. I would think that the liquidator would definitely be in contact with the Registrar of Companies pursuant to the provisions of the Companies Act in matters relating to winding-up of companies.

Anyway, under s. 233 of the Companies Act, where a provisional liquidator has been appointed, he is required to take into his custody or under his control all the property and things in action to which the company is or appears to be entitled. Consequently, pursuant to s. 234 of the same Act the directors are required to submit to the liquidator a statement as to the affairs of the company at the date of the winding up order showing amongst other particulars, its assets, debts and liabilities and a list of creditors, a copy of which will subsequently be filed with the Court. The liquidator shall as soon as possible submit a preliminary report to the Court as to the assets and liabilities and also as to the causes of the company's failure. Under s. 236(2) of the Act, subject to the control of the Court, the liquidator may bring or defend any action or other legal proceeding in the name and on behalf of the company. The above are his basic duties.

The evidence in this case shows that upon receipt of the assessment forms the defendant immediately returned the forms without completing them and had explained in his letter as follows:

> I wish to point out that I was appointed as a provisional liquidator of the abovenamed company on 16 April 1987. As such, the completion of the tax assessment forms for 1981, 1986, 1987 does not arise. I enclose herewith 2 letters to Inland Revenue Department for your reference and the assessment forms for 1981, 1986 and 1987.

At the trial he explained that he could not even comply with the requirement of s. 234 of the Companies Act as he could not trace the directors of the said company in order to request them to prepare the statement of affairs of the company. By not being able to trace the directors he could not get the necessary information which to me would imply that he was not able to have access to the books and accounts of the company which could have at least allowed him to have sight of the accounts for the years 1981, 1986 and 1987. That being so I cannot see how the defendant could have possibly completed the assessment forms for those years and submit them to the Inland Revenue Department bearing in mind that he was only appointed provisional liquidator on 16 April 1987 and as official liquidator on 15 August 1988.

I would think that these facts would have constituted what tantamounts to "reasonable excuse" as stated in s. 120 of the Income Tax Act 1987. Furthermore I would have also thought that the Inland Revenue Department could have at least studied the reasons leading to the non-compliance of s. 78(a) of the Act by the defendant before preferring the charges against him. The department's letter to the defendant in answer to his query about the tax position of the company, referred to above, would seem to imply that the department itself had not diligently kept track of the company's annual tax liabilities from 1983 onwards. The evidence of DW2 who is an officer of the department's branch in Johor Bahru with whom the defendant had met to discuss his predicament would have also, in my opinion, corroborated his testimony to show that he had a valid and reasonable excuse for not completing the assessment forms for those years.

That being so I would allow this appeal and acquit the defendant on all the three offences and further order that the fines paid be returned to him.